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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP EDWARD BROWN,

Defendant and Appellant.

B207958

(Los Angeles County
Super. Ct. No. KA077310)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Tia Fisher, Judge. Affirmed.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Phillip Edward Brown challenges a trial court order directing him to pay \$7,416.50 in victim restitution. Brown contends the order must be reversed because he was not afforded an opportunity to contest the restitution amount at a hearing. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2007, the People filed an information charging that Brown committed murder (Pen. Code, § 187, subd. (a))¹ while he was out of custody on bail (Pen. Code, § 12022.1); that he inflicted corporal injury upon his girlfriend and the mother of his child (Pen. Code, § 273.5, subd. (a)) and had suffered prior convictions within the meaning of 273.5, subdivision (e)(1); and that he had suffered two prior convictions within the meaning of section 667.5, subdivision (b).

Given the sole contention on appeal, we provide only a brief recitation of the underlying facts. On December 3, 2006, Brown punched and hit his girlfriend, Angelica Aguirre, causing bruises. That night, Aguirre left the house she shared with Brown and moved in with her parents. Approximately two days later, Brown showed up at Aguirre's parent's house, shortly after Aguirre had returned from collecting her belongings. Aguirre and her father, Merced Aguirre, were standing outside. Aguirre went inside to call the police while her father remained outside. When Aguirre went back outside, Brown was gone, but her father lay on the lawn under the bushes. Merced Aguirre had been stabbed 13 times in the chest and back. He was pronounced dead at the scene.

In April 2008, as part of a negotiated sentence, Brown pled no contest to murder in violation of section 187, subdivision (a), and corporal injury to a spouse, cohabitant, or child's parent, in violation of section 273.5, subdivision (a). He also admitted using a dangerous and deadly weapon—a knife—in connection with the murder.

¹ All further statutory references are to the Penal Code unless otherwise noted.

Prior to the plea, the prosecutor advised Brown that he would have to pay restitution to the victim. Brown asked how much the restitution would be. The court responded:

“I order restitution to the victim. I don’t put any amount on it because I don’t know. I reserve jurisdiction on it which means I still can handle it later if that issue comes up. Do you understand that? I’ll tell you that I lawfully have to order restitution.

Defendant: So it’s like an offer for them to—

Court: Listen. I’m ordering it.

Defendant: That’s what I mean. The order is—what you are saying is the person has the right to do restitution. As of now they haven’t said anything about restitution. You ordered it but they haven’t said anything about an amount at this time.

Court: Right. So there’s no actual dollar amount put in the order.

Defendant: Because they haven’t requested any dollar amount.

Court: Right. And they might not. They might. If they do, we will bring you back if you want to contest it.

[Defense counsel]: I explained to him, your honor, in cases like this it could be funeral costs, costs associated with it. That’s what I explained.

Court: Sure. That’s right. Do you understand that?

Defendant: Yes.”

After this colloquy, and other advisements of his rights, Brown pled no contest, and the court again explained that it would retain jurisdiction to order restitution. The court sentenced Brown to a total prison term of 18 years to life.²

In May 2008, the case was called for further proceedings on restitution. The proceedings were not reported. A minute order contained the following entry:

“Defendant is not present in court, and not represented by counsel.³ An order for restitution and abstract of judgment is signed and filed this date. The amount of restitution to the victim (\$7,416.59) is to be paid by the defendant to the [S]tate of California Victim Compensation Board. Counsel for the defendant telephonically stipulates to the restitution amount (the defendant previously

² The sentence consisted of 15 years to life on count 1 (§ 187, subd. (a)), 2 years on count 2 (§ 273.5), and 1 year for the use of a deadly and dangerous weapon enhancement (§ 12022, subd. (b)(1)). The court also ordered Brown to pay a \$200 restitution fine (§ 1202.4), a \$20 court security fee (§ 1465.8, subd.(a)(1)), and imposed but stayed a \$200 parole restitution fine (§ 1202.45).

³ The People did not appear at the proceedings.

waived his right to be present at any restitution hearing). The defendant remains remanded in state prison.”

The record includes a restitution notice and claim activity summary indicating that Merced Aguirre’s wife claimed \$7,416.59 for funeral and burial expenses from the Victim Compensation Board’s victims of crime program.

DISCUSSION

Brown contends the restitution order must be vacated because he was not afforded a hearing, and because he did not waive his right to be present at restitution proceedings. The People assert that Brown did in fact waive his right to be present, and that any error in connection with Brown’s absence was harmless.

I. Section 1202.4, subdivision (f)

Under section 1202.4, subdivision (f), “in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record.” Section 1202.4, subdivision (f)(1), provides that the “defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution.”

II. Brown’s Stipulation to the Restitution Amount

Brown first argues that he was denied the right to a restitution hearing. It is undisputed that Brown had a right to a hearing on the amount of restitution, and had the right to present evidence or contest the amount. (*People v. Resendez* (1993) 12 Cal.App.4th 98, 113; *People v. Sandoval* (1989) 206 Cal.App.3d 1544, 1550 (*Sandoval*); *People v. Scroggins* (1987) 191 Cal.App.3d 502, 508.) However, the record reflects that at some point on or before the date of the restitution order, Brown’s counsel stipulated to the restitution amount, thereby eliminating the need for further proceedings

or a more formal hearing. When a defendant is afforded the opportunity for a restitution hearing but fails to request one, there is no error. (*People v. Riccio* (1996) 42 Cal.App.4th 995, 1003.)

III. Brown's Absence from Restitution Proceedings Was Harmless Error

Brown's second and related contention is that he did not waive his right to be present at a restitution hearing, and the minute order's notation is not sufficient to establish that he effectively waived his right to be present for restitution proceedings. We conclude any error was harmless.

Brown had the right to be present at restitution proceedings. (*People v. Robertson* (1989) 48 Cal.3d 18, 60 (*Robertson*) [defendant has constitutional and statutory right to be present at sentence modification hearing and imposition of sentence]; *People v. Wilen* (2008) 165 Cal.App.4th 270, 287 (*Wilen*) [right to be present "includes the defendant's presence at 'critical stage[s] of the criminal prosecution,' which includes 'sentencing and pronouncement of judgment.' [Citations.]"]; *People v. Cain* (2000) 82 Cal.App.4th 81, 87 [restitution hearing under section 273.5 is "part and parcel of the sentencing process."].)

The right to be present during critical criminal proceedings is protected by the United States Constitution and by state constitutional and statutory law, but a defendant may waive that right. (*People v. Davis* (2005) 36 Cal.4th 510, 530 (*Davis*).) The federal constitutional right to be present may be waived by a competent defendant. (*Robertson, supra*, 48 Cal.3d at pp. 61-62; *People v. Romero* (2008) 44 Cal.4th 386, 418 (*Romero*).) And under section 977, in felony cases the defendant must be present "at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of imposition of sentence." (§ 977, subd. (b)(1).) The defendant is also to be present at all other proceedings, "unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present" (*Ibid.*)

Here, Brown argues that despite the minute order's notation, only he, not his counsel, could waive his presence, and the record contains no evidence that he did so. *Davis* is instructive on this issue. The case concerned a defendant's absence from a pretrial hearing at which counsel and the court listened to tape excerpts the prosecutor sought to admit into evidence, and counsel argued the admissibility of the excerpts. (*Davis, supra*, 36 Cal.4th at p. 530.) At the beginning of the hearing, defense counsel stated that the defendant had decided to waive his presence at the hearing. (*Ibid.*) Our high court considered whether this waiver was sufficient. The court noted that some federal cases have held that defense counsel may waive defendant's presence, "but only if there is evidence that defendant consented to the waiver. [Citations.] At a minimum, there must be some evidence that defendant understood the right he was waiving and the consequences of doing so. [Citation.]" (*Id.* at p. 532.)

In *Davis*, the record showed only that defense counsel represented to the court that the defendant would waive his presence, and there was no evidence that defense counsel discussed the defendant's right to be present with him, or that he understood. As a result, the court could not conclude that the defendant "knowingly and intelligently waived his right to presence at the hearing." (*Davis, supra*, 36 Cal.4th at p. 532; see also *Robertson, supra*, 48 Cal.3d at p. 62 [defendant's waiver form could not be construed as a "knowing and intelligent waiver" of his presence at the time of sentence]; *People v. Young* (2005) 34 Cal.4th 1149, 1213 (*Young*) [oral waiver was valid where nothing in record suggested defendant was unable to understand and waive his right to be present].) Further, the defendant's presence was required under sections 977 and 1043,⁴ and the defendant had not executed a written waiver of his presence. (*Davis, supra*, at p. 531.) The court concluded it was therefore error under both federal and state law for the trial court to conduct the pretrial hearing in the defendant's absence.

⁴ Under section 1043, a defendant is to be present at trial unless he or she is disruptive, or, in a non-capital case, if the defendant is voluntarily absent. (§ 1043.)

Similarly, in this case there is no evidence that Brown consented to the waiver of his presence at the restitution proceedings. Further, there is no evidence in the record that allows us to conclude that he knowingly and intelligently waived his right to be present at future restitution proceedings. In addition, he did not execute a written waiver in compliance with section 977. As a result, we must agree with Brown that the trial court erred in conducting the restitution proceedings in his absence.

However, we disagree with Brown's assertion that the error is not subject to harmless error analysis. On the contrary, when confronted with the defendant's improper absence from a criminal proceeding, courts have routinely considered whether the error was harmless or prejudicial under *Chapman v. California* (1967) 386 U.S. 18, 23, as to the federal constitutional right, and *People v. Watson* (1956) 46 Cal.2d 818, 836, as to the right under state law.⁵ (*Romero, supra*, 44 Cal.4th at p. 419; *Davis, supra*, 36 Cal.4th at pp. 532-533; *Young, supra*, 34 Cal.4th at p. 1214 [error in accepting oral waiver under sections 977 and 1043 was harmless]; *Robertson, supra*, 48 Cal.3d at p. 62; *People v. Dickey* (2005) 35 Cal.4th 884, 923 [although capital defendant may not waive statutory right to be present at trial, error is reversible only if prejudicial; i.e. if there is a reasonable possibility the jury would have reached a different result absent the error].)

Brown has not explained why his absence from the restitution proceedings was prejudicial, or how things might have been different had he been present. (*Davis, supra*, 36 Cal.4th at pp. 533-534.) Although his attorney appeared only telephonically, defense counsel apparently had notice of the proceedings and participated by phone long enough

⁵ *Sandoval* does not support Brown's argument. In *Sandoval*, the defendant was denied a meaningful opportunity to contest the amount of restitution ordered. The trial court unexpectedly departed from a probation report's recommendation when setting the amount of restitution, thus denying the defendant the chance to be heard. (*Sandoval, supra*, at p. 1550.) The case was remanded to allow the defendant that opportunity. In contrast, here Brown, through counsel, affirmatively waived the opportunity to contest the amount of restitution by stipulating to the amount, thus foregoing a full hearing. The only issue we have to consider is whether Brown's absence from the restitution proceedings was harmful error. *Sandoval* does not address whether harmless error analysis applies when the issue is the defendant's absence from restitution proceedings.

to stipulate to the restitution amount. Further, Brown has not argued on appeal that he had evidence with which he might have contested the restitution amount, or that he had any information, evidence, or arguments that his counsel could not have made or presented. The stipulation in fact suggests that Brown did not have an evidentiary or other basis to contest the restitution amount.

A “defendant whose right of personal presence [is] denied bears the burden of demonstrating prejudice.” (*Wilen, supra*, 165 Cal.App.4th at p. 290.) Even had Brown and his counsel been physically present for a restitution hearing, we have no indication that Brown’s presence was likely to have led to a different outcome on the restitution amount or that it would have affected the restitution amount in any way. (*Ibid.*) The trial court previously advised Brown that it would order restitution, and that only the amount remained to be determined. The restitution amount was comprised entirely of funeral and burial expenses. Brown was still represented by counsel. Nothing prevented Brown’s counsel from requesting a hearing or presenting evidence to challenge the requested restitution amount. Brown does not contend that he had additional information or evidence to offer had he been present. We conclude that the trial court’s error in moving forward on restitution without a proper waiver of Brown’s right to be present was harmless under any standard.⁶

⁶ Brown’s analogy of his case to that of a defendant denied a hearing under *People v. Marsden* (1970) 2 Cal.3d 118, is unavailing. A *Marsden* hearing allows the defendant to speak directly to the trial court. For that reason, the defendant may disclose something that counsel is unable to disclose on the defendant’s behalf—namely the defendant’s complaints about counsel. In contrast, in the restitution context, if a defendant is represented by counsel, counsel will argue and act on the defendant’s behalf, as in any other proceeding. Defendant’s presence at a restitution hearing does not mean that the defendant who is represented by counsel suddenly begins acting on his own, directing his own case, or directly addressing the court. We have no reason to assume—as we would when reviewing the denial of a *Marsden* hearing—that had there been a hearing at which Brown was present, Brown would necessarily have added something his counsel could not provide. Brown’s absence was not per se prejudicial and must be subjected to harmless error analysis.

DISPOSITION

The judgment and restitution order are affirmed.

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BIGELOW, J.

We concur:

FLIER, Acting P. J.

BENDIX, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.